IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

| SNMP RESEARCH, INC. and SNMP | § | Case No. 3:20-cv-00451-CEA-DCP |
|-------------------------------|---|--------------------------------|
| RESEARCH INTERNATIONAL, INC., | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Jury Demand |
| | § | |
| BROADCOM INC.; BROCADE | § | |
| COMMUNICATIONS SYSTEMS LLC; | § | |
| AND EXTREME NETWORKS, INC., | § | |
| | § | |
| Defendants. | § | |
| | § | |

PLAINTIFFS SNMP RESEARCH, INC.'S AND SNMP RESEARCH INTERNATIONAL, INC.'S MOTION TO STRIKE NEW ARGUMENT FIRST RAISED ON REPLY OR, ALTERNATIVELY, TO GRANT LEAVE TO FILE A SUR-REPLY

Plaintiffs SNMP Research, Inc. and SNMP Research International, Inc. ("Plaintiffs"), by and through counsel pursuant to Local Rule 7.1(c), hereby move the Court for an order striking the new argument raised for the first time in Section V.C of Defendant Extreme Networks, Inc. ("Extreme's") reply brief filed in support of its motion to dismiss. *See* Dkt. 291 ("Reply") at 25. In the alternative, and pursuant to Local Rule 7.1(d), Plaintiffs move the Court for leave to file the proposed sur-reply brief attached hereto as Exhibit 1.

In its Reply filed in support of its motion to dismiss Plaintiffs' Amended Complaint, Extreme argued for the very first time that SNMP Research International, Inc. ("SNMP International") is not entitled to punitive damages because the Amended Complaint (Dkt. 244) purportedly does not include "plausible factual allegations" in support of that request. Reply at 25. Extreme points to paragraphs 154 and 155 in the Amended Complaint and argues, for the very first time, that "[t]hese are not factual

allegations that make a plausible inference that Extreme acted 'intentionally, fraudulently, maliciously or recklessly." *Id.* But Extreme's Motion to Dismiss (Dkt. 277) did not attack the Amended Complaint's request for punitive damages, nor did it attack the sufficiency of the host of other allegations detailing Extreme's fraudulent behavior that support the request for punitive damages. *See*, *e.g.*, Dkt. 244 ¶¶ 87-99. Instead, Extreme's Motion to Dismiss attacked SNMP International's fraud claim on the sweeping and novel grounds that it "mirrors" the breach of contract claim and is therefore purportedly barred by the economic loss doctrine (a doctrine that the Tennessee Supreme Court has never applied outside of the products liability context). Dkt. 277 at 20-23.

Because Extreme's Motion to Dismiss did not challenge Plaintiffs' well-pleaded allegations of fraud, *id.*, and because it did not challenge the sufficiency of the Amended Complaint's request for punitive damages, *id.*, Extreme could not reverse course on Reply by arguing that the "claim for punitive damage should be dismissed." Reply at 25. It is "well-settled" that parties cannot raise new issues on reply. *See Malin v. JPMorgan*, 860 F. Supp. 2d 574, 577 (E.D. Tenn. 2012) ("It is well-settled that a movant cannot raise new issues for the first time in a reply brief because consideration of such issues 'deprives the non-moving party of its opportunity to address the new arguments."").

In light of the foregoing and Extreme's improper argument newly-presented on page 25 of its Reply, Plaintiffs respectfully request that the Court strike this page—or at a minimum, decline to address it. *See, e.g., Lincoln Mem'l Univ. Duncan Sch. of L. v. Am. Bar Ass'n*, No. 3:11-CV-608, 2012 WL 1108125, at *7 (E.D. Tenn. Apr. 2, 2012) (declining to address argument raised for the first time on reply "as a matter of litigation fairness and procedure"). Alternatively, Plaintiffs respectfully request leave to file the attached sur-reply addressing Extreme's new argument. *Frost v. Unum Life Ins. Co. of Am.*, No. 1:21-CV-269, 2023 WL 2261415, at *18 (E.D. Tenn. Feb. 14, 2023).

Respectfully submitted,

Dated: April 20, 2023 By: /s/ Cheryl G. Rice

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